Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

STATE STREET BANK & TRUST COMPANY,

Cross-Petitioner,

v.

JERRY R. SUMMERS, *et al.*,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

The settlement agreement between Petitioners and the settling co-fiduciaries contains a bar order that extinguishes State Street Bank & Trust's ("State Street") right to seek contribution and indemnity from the settling co-fiduciaries. Such a bar order requires a fairness hearing to evaluate the equities of the bar order. Because the Seventh Circuit Court of Appeals affirmed the district court's decision granting State Street's motion for summary judgment, the Seventh Circuit dismissed State Street's cross-appeal as academic and did not rule on whether the bar order and the district court's failure to conduct an evidentiary hearing on its fairness was unfair to State Street. Should the Supreme Court accept review, State Street requests that this Court also review the following question:

Did the district court abuse its discretion when it approved a settlement agreement containing a bar order that deprives a non-settling fiduciary of its right to contribution and indemnity under ERISA from a settling co-fiduciary without conducting an evidentiary fairness hearing?

LISTED PARTIES AND RULE 29.6 DISCLOSURE STATEMENT

In addition to the parties identified in the caption, the following were parties in the consolidated appeal proceedings before the Seventh Circuit Court of Appeals and are cross-respondents before this Court: George T. Lenormand, Jeffrey D. Crites, Louise Van Rensburg, James E. Shambo, UAL Corporation ESOP Committee, Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clements, and Craig Musa.

Cross-Petitioner State Street Bank & Trust Company ("State Street") is a wholly-owned subsidiary of State Street Corporation, a bank holding company with no other business.

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Rules and Regulations:

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OPINIONS AND JUDGMENTS BELOW

Cross-Petitioner, State Street Bank & Trust Company ("State Street"), conditionally cross-petitions for a writ of certiorari to review that portion of the opinion and judgment of the Seventh Circuit dismissing State Street's appeal of the district court's approval of a settlement agreement containing a bar order, and the judgment of the United States District Court for the Northern District of Illinois approving a settlement agreement containing a bar order.

The opinion of the Seventh Circuit is reported at 453 F.3d 404 (7th Cir. 2006). It is also included in the appendix filed by Petitioners, Summers, *et al.* in Docket No. 06-439. (Pet. App. 1a-19a). The district court's order disposing of the issue that is the subject of this cross-petition is not reported. (Cross-Pet. App. 1a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 28, 2006. Summers's petition for a writ of certiorari was placed on this Court's docket on September 27, 2006, Docket No. 06-439. This conditional cross-petition is timely under Supreme Court Rule 12.5. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Nature Of The Action

Petitioners, participants in the United Airlines Corporation Employee Stock Ownership Plan (the "UAL Corporation ESOP" or the "Plan"), filed this class action on February 28, 2003, against the Plan, the UAL Corporation ESOP Committee (the "Committee"), and the individual members of the Committee, Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clements, and Craig Musa (the "Settling Defendants" and, together with Petitioners, the "Settling Parties").[1] The district court had original jurisdiction because Petitioners asserted a federal question claim arising under the Employee Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

The Committee and its members were the Plan's named fiduciaries responsible for establishing the Plan's investment policy.[2] Petitioners alleged the Committee and its members breached their fiduciary duty to the Petitioners by failing to

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1. *See* Item No. 1 of the Record as contained in the District Court's Docket (hereinafter referred to as "R.Doc." followed by the docket number, and brief description of item): R.Doc.1, Complaint.

2. *See* R.Doc.130, Appendix of Exhibits Submitted to the District Court in Support of State Street's Statement of Undisputed Material Facts, (hereinafter referred to as "App. Ex.") Exhibit No. 2, Ex. B (Plan at p. 42, ¶ 11.1); *see also* State Street's Appendix Submitted to the Seventh Circuit Court of Appeal (hereinafter referred to as "SA") pp. 140-141(Trust Agreement at pp. 1-2)); R.Doc.178, Plaintiffs' Statement of Additional Facts ("Plfs' Add'l Facts"), at ¶ 2.

diversify the ets of the Plan soon after they knew, or should have known nited Airlines Corporation ("UAL") was suffering financially and its bankruptcy was "imminent." They alleged the Committee and its members should have known UAL's bankruptcy was "imminent" by October 17, 2001, when UAL CEO Jim Goodwin sent a letter (the "Goodwin Letter") to all UAL employees painting a dire picture of UAL's financial condition and rallying the employees to commit to improving the company's financial viability.[3]

Petitioners added State Street as a defendant on July 28, 2004, almost a year and a half after they initiated the lawsuit.[4] State Street was the "directed trustee" for the Plan.[5] If an ERISA plan "provides that the trustee or trustees are subject to the direction of a named fiduciary [the Committee] who is not a trustee, . . . the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to [ERISA]." 29 U.S.C. § 1103(a)(1). The Plan required investing exclusively in UAL stock. Accordingly, as a directed trustee, State Street was required to invest the Plan's assets "exclusively" in UAL stock[6] and follow the directions of the Committee as long as those directions were not in conflict with the terms of the Plan or ERISA.[7]

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3. R.Doc.1, Complaint.

4. R.Doc.42, Second Amended Complaint.

5. SA 138-165, Trust Agreement; R.Doc.130, SUF at ¶ 2.

6. SA 144-45, Trust Agreement at §3.3.

7. SA 149, Trust Agreement at §3.6.3.

Petitioners alleged State Street breached its fiduciary duty as a directed trustee by failing to override the terms of the Plan and diversify the Plan's investments following the issuance of the Goodwin Letter.[8] Petitioners further alleged State Street breached its duty of loyalty because it knew the Committee was comprised of UAL employees and members of the UAL employee unions and were thus "inherently" or "potentially" conflicted by virtue of this dual status. State Street's alleged liability is therefore derivative of the Committee's liability. State Street could only be liable if the Committee and its members were ultimately found liable for breaching their duty of prudence and/or loyalty.

B. The Settlement Agreement

On July 18, 2005, Petitioners and the Settling Defendants finalized the terms of the Settlement Agreement.[9] The Settlement Agreement contains a bar order provision (the "Bar Order") precluding State Street (the only non-settling defendant in this action) from bringing any claims of contribution or equitable indemnity against the Settling Defendants in the event a final judgment is ultimately rendered against State Street.[10]

The Settlement Agreement also includes a "Judgment Reduction" clause providing that any judgment against State Street would be "set off" (or reduced) by the greater amount of either: (i) the *pro tanto* approach, which is the $5.25

8. R.Doc.42, Second Amended Complaint at ¶ 128.

9. R.Doc.205, Joint Motion To Stay Pending Approval of Settlement.

10. R.Doc.210, Pls' Memo ISO Prelim. Approval of Settlement, Ex. A, Settlement Agreement at p. 11, ¶ 2.4 *et seq.*

million settlement amount between Petitioners and Settling Defendants ("Settlement Credit"); or (ii) a modified proportionate fault approach, which is the value of any contribution or equitable indemnification claim which the district court determines State Street would otherwise have been able to assert against the Settling Defendants capped according to the Settling Defendants' ability to pay ("Contribution Credit").[11] In moving for preliminary approval of the Settlement Agreement, Petitioners and the Settling Defendants argued a financial cap was necessary because the Settling Defendants had very limited financial resources.[12]

On September 30, 2005, State Street timely objected to the Settlement Agreement on the basis it unfairly deprived it of its right to contribution and indemnity from the Settling Defendants.[13] In particular, the Bar Order ignored Settling Defendants' other sources of contribution, including rights to indemnification from the Air Line Pilots Association ("ALPA") potentially worth millions of dollars. On October 12, 2005 (the same day he granted summary judgment in favor of State Street), the Honorable Samuel Der-Yeghiyan in the United States District Court, Northern District of Illinois, approved the Settlement Agreement and overruled State Street's objection to it without explanation.[14]

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11. *Id.*, Settlement Agreement at p.5, ¶ 1.20 (ii) and pp. 11-12, ¶¶ 2.4.2-2.4.3.

12. R.Doc.210, Pls' Memo ISO Prelim. Approval of Settlement at p. 1.

13. R.Doc.260-262, State Street's Objection to Partial Settlement.

14. R.Doc.278, Minute Entry and Cross-Pet. App. 1a.

C. Petitioners' Appeal To The Seventh Circuit

Petitioners appealed the district court's order granting summary judgment in favor of State Street to the Seventh Circuit Court of Appeals. State Street cross-appealed the district court's order overruling State Street's objection to the Settlement Agreement. On June 28, 2006, the Seventh Circuit affirmed the district court's order granting summary judgment to State Street. The Seventh Circuit's opinion and judgment dismissed State Street's cross-appeal, reasoning that since it was affirming the summary judgment order in State Street's favor, it did not need to resolve the question regarding the Settlement Agreement and Bar Order. *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 413 (7th Cir. 2006).

In its opinion, the Seventh Circuit highlighted the potential unfairness of the Bar Order underscoring that the premise of the Bar Order incorrectly assumes the Settling Defendants lack any assets to pay a judgment for contribution:

> The judge in approving the settlement entered an order in effect barring State Street from seeking anything from the Committee members beyond what personal assets they may have. The judge gave no reason for this action; if we may judge from the arguments of the parties' lawyers, either he thought this result "fair" or, as argued by the plaintiffs' lawyer, thought it would make no difference because State Street could in no event obtain from the Committee members money they don't have. But if this is what the judge thought, he was wrong. The members' unions have agreed to indemnify them.

Summers v. State Street Bank & Trust Co., 453 F.3d at 412-13.

REASONS FOR GRANTING WRIT

The Seventh Circuit did not rule on the Bar Order issue, noting: "Since we are affirming the dismissal of the plaintiffs' claim against State Street, there is no imperative need to discuss the cross-appeal; it is academic unless this court sitting *en banc*, or the Supreme Court, reverses our decision in favor of State Street." *Summers v. State Street Bank & Trust Co.*, 453 F.3d at 412. If this Court ultimately grants the petition for review and reverses the judgment in favor of State Street, State Street's cross-appeal would no longer be academic, and fairness would dictate that the issues raised in State Street's underlying cross-appeal pertaining to the Bar Order first be remanded to the Seventh Circuit for review prior to any remand to the district court.

CONCLUSION

For the foregoing reasons, State Street respectfully submits that if this Court grants the petition for a writ of certiorari in Docket No. 06-439, it should also grant this conditional cross-petition to fully address the issues presented in this case.

Respectfully submitted,

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APPENDIX

APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED OCTOBER 12, 2005

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge:
Samuel Der-Yeghiayan

Case Number: *003 C 1537*

Date: *10/12/2005*

Case Title: *Summers v. UAL*

Docket Entry Text:

Fairness hearing held. As stated on the record, plaintiffs' motion for final approval of partial settlement is granted. The Court approves the partial settlement between plaintiffs and settling defendants. The plaintiffs are given until 10/28/05 to send out notice to the class regarding attorneys' fees. Fairness hearing as to attorneys' fees is set for 11/22/05 at 11:00 a.m.